IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-878

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut
Appellant,

v.

DONNA DOE, ET AL
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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IN THE

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EDWARD W. MAHER, Commissioner of
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Appellant,

v.

DONNA DOE, ET AL
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of a three-judge United States District Court for the District of Connecticut, entered on June 17, 1976, permanently enjoining the Appellant from further enforcing Section 404.6, effective November 1, 1975, of Volume I, Chapter III, of the Connecticut Department of Social Services Public Assistance Program Manual, and submits this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial question is presented.

OPINION BELOW

The opinion of the three-judge District Court which is the subject of this appeal is reported in 414 F.Supp. 1368. A copy of that opinion is attached hereto as Appendix A. Earlier opin-

ions in this same case are reported in *Doe* v. *Norton*, 356 F.Supp. 202 (D. Conn. 1973) (in which a single-judge District Court denied an application for a preliminary injunction); and in 365 F.Supp. 65 (D. Conn. 1973) (original opinion of three-judge court upholding the constitutionality of § 52-440b of the General Statutes of Connecticut). Probable jurisdiction noted, *Roe et al* v. *Norton, Commissioner of Welfare*, 415 U.S. 912 (1974), judgment vacated and remanded, 422 U.S. 391 (1975).

JURISDICTION

This suit was brought by the plaintiffs (appellees) under 42 U.S.C. § 1983 and jurisdiction was based on 28 U.S.C. § 1343(3). In the hearing on remand from the Supreme Court of the United States before a three-judge District Court, the plaintiffs continued to seek to enjoin, in addition to declaratory relief under 28 U.S.C. § 2201 et seq., the enforcement of a state statute and to restrain the appellant-state commissioner of social services from the enforcement, operation, and execution of a regulation of statewide applicability in the enforcement and execution of such state statute on the grounds of their unconstitutionality.

In the hearing on merits after the remand from the Supreme Court of the United States, the three-judge District Court entered judgment on June 17, 1976 (a copy attached hereto as Appendix B), and the notice of appeal was filed in that District Court on July 29, 1976 (a copy attached hereto as Appendix C).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §§ 1253 and 2101(b). The following decisions sus-

tain the jurisdictions of the Supreme Court to review the judgment on direct appeal in this case:

King v. *Smith*, 392 U.S. 309, 312 (1968);
Moody v. *Flowers*, 387 U.S. 97, 101-102 (1967);
American Federation of Labor v. *Watson*, 327 U.S. 582, 592-593 (1946);
Wilentz v. *Sovereign Camp*, 306 U.S. 573, 579-580 (1939);
Okla. Gas Co. v. *Russell*, 261 U.S. 290, 292 (1923);
Alabama Comm'n. v. *Southern R. Co.*, 341 U.S. 341, 343-344 (1951);
Florida Lime Growers v. *Jacobsen*, 362 U.S. 73 (1960);
See: *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954).

QUESTIONS PRESENTED

The questions presented by this appeal are:

I. Whether federal regulation, 45 C.F.R. § 303.5, is invalidated by § 402(a) of the Social Security Act, 42 U.S.C. § 602(a) (1976 Supp.), as amended by Pub. L. No. 93-647 (88 Stat. 2337) and/or by Pub. L. No. 94-88 (Aug. 9, 1975).

II. With respect to any mother who is an applicant or recipient under the Aid to Families with Dependent Children program who has an out of wedlock child and which mother is unable to name the father of such child because such mother in fact does not know the father's name, whether the Social Security Act as amended requires the Connecticut Commissioner of Social Services to first make a determination as to whether such mother has "good cause" for refusing to cooperate, as defined by the Social Security Act as amended and 45 C.F.R. § 303.5 and/or proposed federal regulation, 41 Fed. Reg. 34294-34301 (August 13, 1976) (proposed 45 C.F.R. Part 232), and to first provide a fair hearing before the commissioner may make any referral under § 52-440b of the General Statutes of Connecticut.

STATUTES INVOLVED

Section 404.6, effective November 1, 1975, Volume I, Chapter III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Program Manual, is the regulation whose validity is involved in this action and it is set forth in Appendix D which is attached hereto.

STATEMENT OF THE CASE

The plaintiffs in this action are all unwed mothers of illegitimate children who receive Connecticut welfare benefits under the Aid to Families with Dependent Children (A.F.D.C.) program of the Social Security Act of 1935, Sections 401 et seq., 42 U.S.C. §§ 601 et seq.[1] The plaintiffs challenged the constitutionality of § 52-440b of the General Statutes of Connecticut, a copy of such statute being hereto attached as Appendix E.[2] Under the challenged statute, the mother of any illegitimate child is legally obligated to disclose the name of her child's biological father and to prosecute a paternity action against the named putative father.[3]

The constitutionality of the challenged statute was upheld by the district court, 365 F.Supp. 65, and its decision was appealed to the United States Supreme Court, which noted probable jurisdiction, 415 U.S. 912, 94 S.Ct. 1406, 39 L.Ed. 2d 466 (1974). The United States Supreme Court va-

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[1] The plaintiffs, Hattie Hoe, Linda Robustelli, and Louis Parley, Esquire, a guardian *ad litem* for the children of the named plaintiff, were permitted to intervene in this action. Doe v. Maher, 414 F.Supp. 1368, 1371 n. 3 (D. Conn. 1976). Separate counsel was also appointed to represent the interest of the children. Doe v. Norton, 365 F.Supp. 65, 69 (D. Conn. 1973).

[2] Because of the injunctive relief sought in this action, a three-judge district court was ordered. Doe v. Norton, 356 F.Supp. 202, 203 (D. Conn. 1973). The plaintiffs' motion for preliminary injunctive relief was denied. *Id.* at 204-207.

[3] As part of a comprehensive legislative scheme, the State or any town in the State may institute a separate paternity action and subpoena the mother of the illegitimate child as a witness. § 52-440a of the General Statutes of Connecticut.

cated the district court's judgment and remanded the case to the district court

> "for further consideration in light of Pub. L. 93-647, and, if a relevant state criminal proceeding is pending, also for further consideration in light of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971), and *Hoffman* v. *Pursue, Ltd.*, 420 U.S. 529, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975)." *Roe* v. *Norton*, 422 U.S. 391, 393, 95 S.Ct. 2221, 2222, 45 L.Ed. 2d 268 (1975).

Since the Supreme Court's ruling, § 402(a), 42 U.S.C.A. § 602(a) (1976 Supp.), has been amended once again by Pub. L. No. 94-88 § 208(a) (August 9, 1975)

> ". . . so that, with this most recent amendment shown in brackets, it now reads:
>
> '§ 402(a):
>
> "A state plan for aid and services to needy families with children must
>
> . . . .
>
> '(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required —
>
> . . .
>
> '(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child [unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as

determined by the State agency in accordance wth standards prescribed by the Secretary, which standards shall take into consideration the best interest of the child on whose behalf aid is claimed]; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in secton 406(b)(2) (without regard to subparagraphs (A) through (E) of such section):

'(27) provide, that the State has in effect a plan approved under part D and operate a child support program in conformity with such plan.'" *Doe* v. *Maher*, supra at 1377.

Prior to the decision by the District Court after the remand by the United States Supreme Court, the Defendant-Appellant continued to exercise the provisions of § 52-440b through the implementation of § 404.6, effective November 1, 1975, Vol. I, Chap. III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Program Manual, Appendix D herein, pursuant to federal regulation, 45 C.F.R. § 303.5.[4]

On the remand from the United States Supreme Court, the District Court thereupon heard the case again on its merits modifying the original class determination, over the Defendant-Appellant's objections, as follows:

"First, the original class determination is modified to include three sub-classes. The first sub-class consists of all persons against whom contempt actions under § 52-440b

[4] Copies of § 404.6 and 45 C.F.R. § 303.5 were made full exhibits in the hearing on the merits of this action which was held before the District Court.

are currently pending. The second sub-class consists of all persons against whom action under the statute has been threatened, or will be threatened in the future, but against whom no actions are presently pending. The third sub-class consists of the children of all persons in the first and second sub-classes." *Doe* v. *Maher*, supra at 1371 n.3.[5]

On August 13, 1976, after the second decision in this case by the District Court, the Department of Health, Education and Welfare pursuant to the congressional mandate contained in Pub. L. No. 93-674, as amended by Pub. L. No. 94-88, published new proposed standards as to what constitutes "good cause" on the part of an A.F.D.C. applicant or recipient for refusing to cooperate with the State in establishing paternity of a child born out of wedlock for whom aid is claimed. 41 Fed. Reg. 34294-34301 (Aug. 13, 1976) (proposed federal regulations, 45 C.F.R. Part 232). As of the present time, these proposed federal standards or regulations have not become effective.

On remand, the three-judge District Court found that the Connecticut statute was constitutionally valid and that abstention was not required. However, the three-judge District Court further found that Public Laws Nos. 93-647 and 94-88, which conditioned A.F.D.C. eligibility on a recipient's cooperation with the State in establishing paternity unless the recipient's refusal was based on good cause, as determined in accordance with standards taking into consideration the best interest of the child, require that the Defendant-Appellant "may not find an unwed mother who refuses to cooperate in establishing the

[5] The original class determination was made as follows:
"The classes consist of:
(1) those mothers receiving A.F.D.C. assistance who refuse to comply with § 52-440b; and
(2) the illegitimate children of those mothers.
Doe v. Norton, 356 *supra* at 69.

paternity of her child born out of wedlock ineligible for benefits until he first determines that she does not have good cause for refusing to cooperate, under standards which take into account the best interest of the child." The District Court further found that the Defendant-Appellant is ". . . required to comply with such regulations as the Secretary of Health, Education and Welfare shall issue (including the right to a fair hearing). . . ." before beginning or continuing with a contempt proceeding under § 52-440b against any plaintiff in the classes or sub-classes. Based on the foregoing, the District Court "ordered that the defendant shall not remove the plaintiff mothers from the status of eligibility or begin or continue with any pending contempt proceedings against them under § 52-440b until after full compliance with the provisions of Section 402(a)(26) of the Social Security Act as amended."

THE QUESTIONS ARE SUBSTANTIAL

Section 402(a)(26) and (27) of the Social Security Act, as amended by Public Law No. 93-647 and Pub. L. No. 94-88, requires that as a condition of eligibility for A.F.D.C. assistance each applicant or recipient is required to cooperate with the State in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed unless such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State in accordance with standards prescribed by the Secretary of Health, Education and Welfare. The Act as amended further provides that such standards shall take into consideration the best interest of the child on whose behalf aid is claimed. At the time of the Judgment of the District Court on June 17, 1976, the aforesaid standards to be prescribed by the Secretary of Health, Education and Welfare had not been published. The new proposed federal regulations published August 13, 1976 set forth the aforesaid standards, but have not become effective as of this date. Until such new proposed federal regulations do become effective, the Secretary of Health, Education and Welfare considers federal regulation, 45 C.F.R. § 303.5, effective for the purpose of carrying out the good cause and best interest of the child provisions mandated by Congress in the Social Security Act as amended. Appendix F.

Insofar as the so-called "IV-D program" is concerned, federal regulation 45 C.F.R. § 303.5 requires the State to establish paternity of a child on whose behalf aid is claimed. Said regulation expressly states that IV-D state agency "need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interest of the child to establish paternity." 45 C.F.R. § 303.5(b). State welfare regulation § 404.6 (Appendix D), was one of the state welfare regulations being used by the Defendant-Appellant for the purpose of implementing the federal regulation, 45 C.F.R. § 303.5, and the state statutes, § 52-440b and § 17-82b of the General Statutes of Connecticut, in compliance with the Social Security Act as amended.[6]

Where an applicant or recpient is *unwilling* to name the father of her child, under § 404.6 she is free to claim good cause for refusing to so name the father of her child as provided by the Social Security Act as amended, § 17-82b as amended, and federal regulation, 45 C.F.R. § 303.5(b) (setting forth the existng standards as to the child's best interests policy). If the applicant or recipient so claims good cause, the Defendant-Appellant under state welfare regulation § 404.6 and State statute § 17-82b, as amended, is required to make a

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[6] State welfare regulation, § 404.6, was also being used by the Defendant-Appellant as an aid in carrying out the provisions of § 17-82b of the General Statutes of Connecticut as amended by Connecticut Public Act No. 76-334 (effective June 2, 1976). Section 17-82b expressly makes provision for the "good cause" and "best interests of the child" concept mentioned in the Social Security Act as amended.

determination of whether good cause exists for not naming the father of the child in question in accordance with the Social Security Act as amended and in accordance with the standards set forth in federal regulation, 45 C.F.R. § 303.5(b). If it is determined that good cause does not exist, only then is the applicant or recipient mother notified that she is not eligible for A.F.D.C. assistance and that she has the right to claim a fair hearing.[7] If such applicant or recipient claims a fair hearing, she remains on assistance pending the outcome of the fair hearing. If the fair hearing is unfavorable to such applicant or recipient, then she is referred under § 52-440b.[8] In a case where an applicant or a recipient mother is *unable* to name the father of the child in question because such mother does not know the name of the father of her child, such mother is not denied or removed from A.F.D.C. assistance even though she is referred under § 52-440b for the purpose of verification of the lack of her knowledge of such father's identity. § 404.6, Appendix D. Succinctly stated, the Defendant-Appellant has always complied with the good cause provision as set forth in the Social Security Act as amended in accordance with the best interest child standards set forth in the existing federal regulations, 45 C.F.R. § 303.5(b).

Insofar as the permanent injunction is concerned, the District Court has refused to recognize federal regulation, 45 C.F.R. § 303.5, as still being in effect for the purpose of carrying out the good cause and the best interests of the child provisions mandated by the Social Security Act, as amended by Pub. L. No. 93-647 and Pub. L. No. 94-88. As the new proposed federal regulations, setting forth the standards as to what constitutes good cause and the best interest of the child, have

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[7] In such cases, the children of such applicant or recipient mother are not denied or removed from A.F.D.C. assistance. § 404.6, Appendix D.

[8] If the recipient or applicant does not claim a fair hearing within the allotted time in a case where it is determined that such applicant or recipient does not have good cause for refusing to name the father of the child in question, she is referred under § 52-440b.

not become effective as of this date, the Defendant-Appellant does not have any standards with which to carry out the good cause and the best interest of the child provisions mandated by the Social Security Act as amended, except those standards under 45 C.F.R. § 303.5(b) which are not recognized by the District Court. To ignore the District Court's injunction by applying the standards set forth in 45 C.F.R. § 303.5(b) in establishing paternity is to invite a contempt citation by each member of the plaintiff classes and sub-classes. To obey the District Court's injunction, such as is being done, the Defendant-Appellant is unable to carry out presently that vital part of the policy Congress has incorporated into the Social Security Act, which is protecting the child's best interests where paternity is required to be established in cases involving applicant or recipient A.F.D.C. mothers who are unwilling or unable to disclose the name of the father of their respective children.[9] The result is that whatever rights and benefits such illegitimate children are now entitled to enjoy through the disclosure of their respective father's name are presently unattainable.[10] For some of these illegitimate children, those rights and benefits with each passing day may be forever unattainable. "The burdens of illegitimacy, already weighty, become doubly so when neither parent *nor child can legally lighten them. Weber* v. *Ætna Casualty & Surety Co.*, 406 U.S. 164, 171 (1972); emphasis added. Given the national scope of the Social Security Act

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[9] See Appendix G.

[10] Some of the rights and benefits which are attainable through the identity of the father of the illegitimate child in question are discussed in Doe v. Norton, 356 *supra* at 206, with supporting authority. Of no less importance is the right of parentage and the right of support. The running of the statute of limitations in paternity cases is a significant factor in the determination of the illegitimate child's rights and benefits.

The Defendant-Appellant is unable at this time to make any assessment of the amount of any financial loss to illegitimate children or of any financial loss to the Defendant-Appellant directly due to the permanent injunction entered by the District Court below.

as amended, the judgment of the District Court not only conflicts with the child's best interests policy insofar as the State of Connecticut's A.F.D.C. welfare program is concerned, but its influence as of necessity transcends state boundary lines and causes an impact on other state welfare programs governed under the Social Security Act.

1. With respect to the protection of the child's best interests policy as expressed in Pub. L. No. 94-88, § 208(a), it can hardly be doubted that Congress intended that some set of standards should presently govern to enforce the child's best interests policy at the present time until the aforesaid new proposed standards become effective.[11] In determining the proper construction of a statute, it is a cardinal rule that the views of the agency administering the statute have great weight. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970). It has also been stated that the circumstances and conditions confronting Congress at the time of enacting a statute are to be considered in construing that statute. *Moor* v. *County of Alameda*, 411 U.S. 693, 709 (1973). The copies of the departmental letters submitted in Appendix F herein demonstrate that the Department of Health, Education and Welfare considers the standards pertaining to the child's best interests policy in 45 C.F.R. § 303.5(b) to be in force until the new proposed standards become effective. This view on the part of the Department of Health, Education and Welfare is not out of step with Congress' intent in the passage of Pub. L. No. 93-647 and Pub. L. No. 94-88. The conditions and circumstances prevailing at the time that such Public Laws were enacted bear this point out.

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[11] It has taken the Secretary of the Department of Health, Education and Welfare over a year to publish the new proposed standards concerning the child's best interests policy. These new proposed standards may not necessarily become effective until another substantial period of time has expired.

Federal regulation, 45 C.F.R. § 303.5, became effective July 1, 1975, coinciding with the effective date of Pub. L. No. 93-647. 40 Fed. Reg. 27154, 27169 (June 26, 1975). Such federal regulation serves to implement the pertinent provisions of Part B of Pub. L. No. 93-647. 40 Fed. Reg. 19207 (May 2, 1975). Of significance is the fact that 45 C.F.R. § 303.5 became effective one month before the effective date of Pub. L. No. 94-88. Of further significance is the fact that the child's best interests policy is mentioned in 45 C.F.R. § 303.5(b), indicating that before the effective date of the regulation the Department of Health, Education and Welfare was already aware of the child's best interests policy being then considered by Congress in what was to become Pub. L. No. 94-88. The awareness of the child's best interests policy by the Department of Health, Education and Welfare before passage of Pub. L. No. 94-88 clearly shows that the Department of Health, Education and Welfare was acting in accordance with Congress' desire that standards were to become effective immediately for carrying out the child's best interests policy which Congress was considering before and at the time of enacting Pub. L. No. 94-88. Such awareness on the part of the Department of Health, Education and Welfare further shows that Congress intended that the standards pertaining to the child's best interests policy in 45 C.F.R. § 303.5(b) were to be in effect until the new proposed standards become effective. When this aspect is weighed against the absence of any language in Pub. L. No. 94-88 prohibiting the standards in 45 C.F.R. § 303.5(b) and weighed against the lack of any legislative history indicating a contrary position to 45 C.F.R. § 303.5(b), it cannot be supposed that Congress, in 1975, intended that 45 C.F.R. § 303.5(b) was to be invalidated on the passage of Pub. L. No. 94-88.

What cannot be overlooked is the further fact that 45 C.F.R. § 303.5(b) incorporates most of the standards found in the new proposed federal regulations, namely those in 45

C.F.R. § 232.13(d) (41 Fed. Reg. 34300), which circumscribe the circumstances under which establishing paternity would be considered "against the best interests of the child". Although 45 C.F.R. § 303.5(b) contains far less detail, procedure, and instruction than that provided under the new proposed federal regulations, the State under 45 C.F.R. § 303.5(b) is able to carry out the child's best interests policy in every respect as defined in the new proposed federal regulations. When this point is considered in light of the fact that nothing in the legislative history of Pub. L. No. 93-647 and Pub. L. No. 94-88 shows that 45 C.F.R. § 303.5(b) would impede carrying out the child's best interests policy as envisioned by Congress in 1975, the view held by the Department of Health, Education and Welfare that 45 C.F.R. § 303.5(b) is in force for carrying out the child's best interests policy until the new proposed federal regulations become effective should be given deference. See, e.g., *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969); *Lewis* v. *Martin*, supra at 559.

By enacting Pub. L. No. 94-88, Congress declared the intent of an earlier statute, Pub. L. No. 93-647, insofar as the child's best interests policy is concerned. Such subsequent legislation is entitled to great weight in statutory construction. *F.H.A.* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958). Great weight is also given in statutory construction where Congress refuses to alter an administrative construction given to a law by the agency charged to administer the law. *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956). In Pub. L. No. 94-88, Congress expressly called for new standards to be submitted in the future by the Secretary of the Department of Health, Education and Welfare. Pub. L. No. 94-88; 121 Cong. Rec. S14923 (daily ed. Aug. 1, 1975). Congress' silence in Pub. L. No. 94-88 as to the present standards, 45 C.F.R. § 303.5(b), was no accident and not without purpose. Such silence was not only a refusal to overturn 45 C.F.R. § 303.5(b), but a

ratification of 45 C.F.R. § 303.5(b) until the new standards to be submitted by the Secretary of the Department of Health, Education and Welfare could become effective. The Social Security Act as amended thus contemplates that any State may exercise its welfare regulations, such as Connecticut through the exercise of state welfare regulation § 404.6, to effectuate the child's best interests policy in accordance with the standards in 45 C.F.R. § 303.5(b) until any new proposed federal regulations supplanting those standards actually become effective.

It may be that the Defendant-Appellant will be able to comply with the new proposed federal regulations once they become effective insofar as the District Court's judgment is concerned. However, this is of no moment when the Defendant-Appellant's present rights are at stake. The District Court's judgment should be reviewed with respect to the Defendant-Appellant's rights as they now stand and under the law as it now stands. See *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (per curiam 1971).

2. The District Court ordered that the Defendant-Appellant shall not remove any plaintiff from the "status of eligibility or begin or continue with any pending contempt proceedings against" any plaintiff under § 52-440b until the Defendant-Appellant first determines that such plaintiff ". . . does not have good cause for refusing to cooperate, under the standards which take into account the best interests of the child. . . . [in] full compliance with the provisions of Section 402(a)(26) of the Social Security Act *as amended*." *Doe* v. *Maher*, supra at 1381-1382; material in parenthesis supplied; emphasis added. The standards which the District Court had in mind were the forthcoming standards, concerning the child's best interests policy, which are now found in the new proposed federal regulations, 41 Fed. Reg. 34298-34301 (Aug. 13, 1976). The District Court substantively construed Pub.

L. No. 94-88 as invalidating federal regulation, 45 C.F.R. § 303.5(b), which contains the standards that the Department of Health, Education and Welfare consider in present force for carrying out the child's best interests policy.

In footnote 20 of the District Court's opinion, two things are evident which support the claim that the District Court has enjoined the Defendant-Appellant from taking any further enforcement action under 45 C.F.R. § 303.5(b). First, the District Court concluded that § 208(a) of Pub. L. No. 94-88 in its entirety became effective on August 1, 1976. Second, the District Court concluded that where an applicant or a recipient mother refuses to disclose the name of the father of her child, the Defendant-Appellant is unable to make a determination of whether good cause exists for refusing to cooperate, under standards which take into account the best interests of the child, ". . . until the new regulations have been issued and approved." 414 F.Supp. 1381 n.20.

In reference to the good cause and the child's best interests policy requirements provided by Pub. L. No. 93-647 and Pub. L. No. 94-88, the opinion of the District Court below, following footnote 20 in the text of the opinion, states the following:

> "The defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs. This is so even though the proceedings were commenced before the new law was enacted. *Thrope* v. *Housing Authority*, 393 U.S. 268, 282, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). Until the defendant Commissioner has made the required determinations, continuation by him of the contempt proceedings against the plaintiffs, or removing them from the welfare rolls for their failure to 'cooperate' is at the very least inappropriate. Cf. *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972)." 414 F. Supp. 1381-1382.

This passage quoted from the opinion of the District Court below makes clear that before the Defendant-Appellant takes any further enforcement action against any plaintiff under state regulation, § 404.6, and State Statute, § 52-440b, the Defendant-Appellant must first make the required good cause determination under standards which take into account the best interests of the child solely in compliance with such new regulations as the Secretary of the Department of Health, Education and Welfare shall issue pursuant to Pub. L. No. 94-88. This same quoted passage also provides clear warning to the Defendant-Appellant by the District Court of contempt if the Defendant-Appellant attempts to take any further enforcement action under State Regulation § 404.6, and State Statute, § 52-440b, which is not solely in compliance with the good cause requirement and the child's best interests standards in the new regulations as the Secretary of the Department of Health, Education and Welfare shall issue pursuant to Pub. L. No. 94-88.

It should be kept in mind that the District Court throughout its opinion refers to the child's best interests "standards" as the new standards to be submitted by the Secretary of the Department of Health, Education and Welfare pursuant to Pub. L. No. 94-88. The District Court's repeated references to the ehild's best interests standards as those to be submitted at some time in the future by the Secretary of the Department of Health, Education and Welfare as opposed to the District Court's silence as to 45 C.F.R. § 303.5(b), even though it had a copy of federal regulation 45 C.F.R. § 303.5(b) before it as part of Defendant-Appellant's Exhibit No. 1, lends itself to supporting the claim that the District Court has construed Pub. L. No. 94-88 so as to invalidate federal regulation 45 C.F.R. § 303.5(b). Consequently, enforcement action

under state welfare regulation § 404.6 is enjoined until the new proposed federal regulations become effective.

3. There is a class of applicants and recipient A.F.D.C. mothers who have out of wedlock children, but who do not know the name of the father of their respective children. Insofar as eligibility of A.F.D.C. assistance is concerned, these applicant and recipient A.F.D.C. mothers are willing to co-operate with the State, but are unable to provide the name of the father of their respective children because of lacking the necessary knowledge. Even though these applicant and recipient A.F.D.C. mothers are willing to cooperate under their circumstances, the good cause requirement and the child's best interests standards as defined in federal regulation, 45 C.F.R. § 303.5(b) or as defined in the new proposed federal regulations, 45 C.F.R. §§ 232.12 and 232.13 (41 Fed. Reg. 34294-34301, August 13, 1976), are not applicable to their situations. Under State Welfare regulation § 404.6 (Appendix D), these applicant and recipient A.F.D.C. mothers are referred under § 52-440b for verifying their lack of knowledge. As A.F.D.C. assistance is not denied to such mothers in the referral process, and as there is no claim of good cause or of any 'action against the best interests of the child' as these terms are defined under the 45 C.F.R. § 303.5(b) or under the new proposed federal regulations, there is no requirement under the aforesaid federal regulations nor any need to apply the good cause requirement.[12]

Even though the good cause requirement and the child's best interests standards as defined under 45 C.F.R. § 303.5(b) and under the new proposed federal regulations, 45 C.F.R. §§ 232.12 and 232.13, are not applicable where applicant or

[12] Should a particular applicant or recipient A.F.D.C. mother change her position as to not knowing the name of the father of her child, she is not barred from claiming good cause under the Social Security Act at any time.

recipient A.F.D.C. mothers do not know the name of the father of their respective children, the District Court has nevertheless defined the classes and sub-classes in the instant action so as to include such A.F.D.C. mothers. Consequently, any present referral of any of these A.F.D.C. mothers under § 52-440b by way of the state welfare regulation § 404.6, despite fully comporting with the good cause requirement and the child's best interests policy as defined in either 45 C.F.R. § 303.5(b) or in the new proposed federal regulations, would nevertheless fall within the classes and sub-classes as defined by the District Court and constitutes a violation of the District Court's injunction. In addition, the Defendant-Appellant will continue to be enjoined from exercising state welfare regulation § 404.6 as to such applicant and recipient A.F.D.C. mothers even though the Defendant-Appellant will be acting under the new proposed federal regulations, 45 C.F.R. §§ 232.12 and 232.13, once they become effective.

In an attempt to resolve the second issue, the Defendant-Appellant has submitted a motion pursuant to rule 60b of the Federal Rules of Civil Procedure and the motion is now pending before the three-judge District Court below (the motion has not been scheduled for hearing as of this date). The determination of the 60b motion by the District Court will have further impact on the status of the second issue before this Court.

It is submitted that judgment of the District Court is in direct conflict with the Social Security Act as amended in that the District Court has construed Pub. L. No. 93-647 and Pub. L. No. 94-88 so as to invalidate 45 C.F.R. § 303.5(b). As the District Court has failed to recognize 45 C.F.R. § 303.5(b) as the effective federal regulation presently in force, and as the Defendant-Appellant under said regulation and under the Social Security Act as amended is required to effectuate the good cause requirement and the child's best

interests policy now as well as after the new proposed federal regulations become effective, the judgment of the District Court presently enjoining the enforcement of state welfare regulation § 404.6 for carrying out the good cause requirement and the child's best interests policy is also in direct conflict with the Social Security Act as amended. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

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SCHEDULE OF APPENDICES.

APPENDIX A

The opinion of the three-judge District Court below which is the subject of this Appeal.

Donna DOE et al., Individually and on behalf of all others similarly situated

v.

Edward MAHER, Individually and as Commissioner of Social Services of the State of Connecticut.

Sharon ROE et al., Individually and on behalf of all others similarly situated

v.

Edward MAHER, Individually and as Commissioner of Social Services of the State of Connecticut.

Civ. Nos. 15579, 15589.
United States District Court
D. Connecticut.

June 1, 1976.

Unwed mothers of illegitimate children brought suit challenging constitutionality of Connecticut welfare statute, under which an unwed mother may be compelled to disclose the name of the child's putative father and to institute a paternity action. The District Court, 365 F.Supp. 65, dismissed, and appeal was taken. The Supreme Court, 95 S.Ct. 2221, 2222, vacated and remanded. On remand, the Three-Judge District Court, Blumenfeld, District Judge, held that abstention was not required since not only were the pending

contempt proceedings civil in nature but traditional notions of federal-state relations compelled federal intervention to enforce congressional intent underlying 1975 amendments to Social Security Act, that such amendments, which conditioned eligibility on a recipient's cooperating with the state in establishing paternity unless recipient's refusal was based on good cause, as determined in accordance with standards taking into consideration the best interests of the child, did not preempt the state law but that the "best-nterest" standard was to be applied before state contempt proceedings were instituted and before further action was taken in instant proceedings, notwithstanding that instant proceedings were instituted prior to the amendment.

Order accordingly.

Newman, District Judge, concurred in result and filed opnion.

1. Federal Civil Procedure 314

Intervention was allowed so as to assure a named plaintiff in one subclass with a live and continuing controversy. Fed. Rules Civ. Proc. rule 23(c)(1, 4), 28 U.S.C.A.

2. Constitutional Law 46(1) Courts 508(2)

Although distinction between ordering Connecticut to conform its welfare program to federal statutory requirements and merely ordering that federal funds be cut off unless it chose to comply with such requirements could be used to support ripeness analysis as regards unwed mother against whom no contempt proceedings had been commenced, it did not obviate necessity of ruling on constitutional claims of remaining plaintiff mothers, who were already subject of pending contempt proceedings, or of confronting the Younger abstention problems. C.G.S.A. § 52-440b; Social Security Act,

§§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

3. Courts 508(2)

Although intervenor, who had been threatened with prosecution for failure to comply with Connecticut welfare statute requiring her to disclose name of putative father and commence paternity action, could be entitled to declaratory and injunctive relief on a personal basis, she could not, under guise of representing a class, dispense with the Younger abstention considerations for those class members who were presently being prosecuted and who challenged constitutional and statutory validity of the Connecticut procedure. C.G.S.A. § 52-440b.

4. Courts 508(2)

The Younger doctrine did not prohibit either granting of declaratory or injunctive relief as regards Connecticut welfare procedure whereby an unwed mother may be compelled to disclose name of child's putative father and to institute paternity action since pending state proceedings were in nature of civil, rather than criminal, contempt and challenges were not exclusively substantive, constitutional ones but involved initial determination of whether the state statute had been preempted by recent amendment to federal Social Security Act; also, there was no state forum in which plaintiffs could present their constitutional claims. C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

5. Courts 508(7)

Considerations underlying the Younger abstention doctrine, which counsels against federal court interference in pending state criminal proceeding, are the traditional reluc-

tance of federal courts to interfere with pending state criminal proceedings and the comity considerations inherent in the federal system.

6. Contempt 4

Contempt sentences imposed for violating Connecticut statute whereby an unwed mother may be compelled to disclose name of child's putative father and to institute a paternity action are primarily civil, since their purpose is to coerce testimony, rather than to vindicate the dignity of the court; to constitute criminal contempt the statute would have to be interpreted to require proof of an intent to obstruct justice and an eminent threat to the administration of justice; nature of the proceedings did not convert it into criminal contempt simply because the state would sue in place of the parent. C.G.S.A. § 52-440b.

7. Contempt 3

Fact that incarceration might be sanctioned for noncompliance with Connecticut statute whereby an unwed mother might be compelled to disclose the name of the child's putative father and institute a paternity action did not automatically render the contempt proceedings criminal in nature. C.G.S.A. § 52-440b.

8. Courts 490

Comity considerations which underlie the Younger policy of abstention on part of federal courts when it comes to interfering with ongoing state proceedings apply no less to an action because it is civil in nature rather than criminal.

9. States 4.14

Authority to invalidate a state law on preemption grounds is derived from the supremacy clause. U.S.C.A.Const. art. 6, cl. 2.

10. Courts 508(1)

Although the abstention doctrine recognizes the role of state courts as the final expositors of state law it implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. U.S.C.A.Const. art. 6, cl. 2.

11. Courts 508(1)

Although lower federal courts are hesitant to interfere in ongoing state proceeding under any circumstances, the abstention doctrine is particularly inapplicable in the field of preemption since a finding that federal law has preempted application of state law would be a finding concerning the validity of the proceeding itself and not just the constitutionality of the particular statute or its particular application and would be a finding that the intrusion has already occurred; in such case, interference in state affairs would be an intrusion accomplished at the direction of Congress and one which is clearly within Congress' power to direct. U.S.C.A.Const. art. 6, cl. 2.

12. Courts 508(1)

An essential prerequisite for abstention is an available state forum in whch plaintiff can present his federal claims.

13. States 4.14

Determination of whether Connecticut welfare scheme, whereby an unwed mother may be compelled to disclose the name of the child's putative father and to institute a paternity action, was preempted by the Social Security Act was to be determined by reference to federal law as it read at date of decision rather than at time suit was instituted. C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

14. States 4.10

Existence of broad area of mutuality of purpose of state and federal authority is insufficient to completely preclude state action under the preemption doctrine. U.S.C.A.Const. art. 6, cl. 2.

15. States 4.14

Congressional purpose to displace local laws must be clearly manifested; where the federal statute has not expressly proscribed certain action but has merely been silent, there is no basis for an inference that Congress intended to forbid state supplementary action. U.S.C.A.Const. art. 6, cl. 2.

16. States 4.10

Under the preemption doctrine, the mere identity of state and congressional purpose does not furnish a sufficient basis for a finding of congressional intent that the state should refrain from taking steps beyond those which Congress requires of it to achieve their mutual purpose. U.S.C.A. Const. art. 6, cl. 2.

17. States 4.11

In determining whether a substantial conflict exists between state and federal statutes, a court must construe both as narrowly as the language and legislative history permit; only after first attempting to reconcile the statute may the court find a conflict and, thus, avoid ruling on the substantive constitutional claim. U.S.C.A.Const. art. 6, cl. 2.

18. States 4.14

Connecticut welfare statute, under which an unwed mother may be compelled to disclose name of child's putative father and to institute paternity action, is not pre-empted by 1975

amendments to Social Security Act requiring eligiblity of an unwed mother to be determined solely under standards to be established by Department of Health, Education and Welfare, provided the state does not institute contempt proceedings until the mother is found to be without good cause for refusing to cooperate, which determination is to be made under standards that take into consideration the best interests of the child. U.S.C.A.Const. art. 6, cl. 2; C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

19. Social Security and Public Welfare 194

Although 1975 amendment to Social Security Act conditioning eligibility for aid to needy families with children on the applicant's cooperating with the state in establishing paternity of a child born out of wedlock unless refusal to cooperate is based on good cause, as determined under standards taking into consideration the best interests of the child, requires that proposed regulations implementing the "best interests of the child" policy be presented to Congress for specific approval, congressional approval of such regulations is not a precondition to operation of the amendment. Social Security Act, § 402(a) as amended 42 U.S.C.A. § 602(a).

20. Contempt 61(6)

In view of fact that proceedings seeking to hold unwed mothers in contempt for failure to comply with Connecticut welfare statute, under which an unwed mother may be compelled to disclose name of child's putative father and to institute a paternity action, were commenced before 1975 amendments to Social Security Act conditioning such proceedings on a finding of want of good cause for refusal to cooperate, with finding to be made under standards taking into account the best interests of the child, the state was required to comply with the amended act before continuing with the contempt

proceedings. C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

David N. Rosen, Rosen & Dolan, Edward J. Dolan, New Haven, Conn., Frank Cochran, Conn. Civil Liberties Union Foundation, Inc., Hartford, Conn., Stephen Wizner, New Haven, for plaintiffs.

Michael Anthony Arcari, Asst. Atty. Gen., Hartford, Conn., for defendant.

Before TIMBERS, Circuit Judge, and BLUMENFELD and NEWMAN, District Judges.

MEMORANDUM OF DECISION

BLUMENFELD, District Judge:

An earlier decision in this action[1] was appealed to the Supreme Court, which noted probable jurisdiction, 415 U.S. 912, 94 S.Ct. 1406, 39 L.Ed.2d 466 (1974). Thereafter the Court vacated the judgment and remanded the case to this court

> "for further consideration in light of Pub.L. 93-647, and, if a relevant state criminal proceeding is pending, also for further consideration in light of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975)."

Roe v. *Norton*, 422 U.S. 391, 393, 95 S.Ct. 2221, 2222, 45 L.Ed. 2d 268 (1975).

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[1] This opinion assumes knowledge of our original opinion, *Doe* v. *Norton*, 365 F. Supp. 65 (D.Conn.1973); several issues discussed in that decision will not be repeated here. The present Commissioner of Social Services, Edward Maher, has been substituted as a defendant pursuant to Rule 25(d)(1), Fed.R.Civ.P.

[1, 2] In our original opinion, we upheld the constitutionality of Conn. Gen. Stat. Ann. § 52-440b (1976 Supp.)[2] against claims that it denied due process and equal protection, invaded the plaintiffs' rights to privacy and conflicted with the purposes of the Social Security Act. Upon remand, this court has received briefs and heard arguments on all the issues to aid it in its further consideration of the case.[3]

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[2] Conn.Gen.Stat.Ann. § 52-440b (1976 Supp.) reads:

> "(a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a *decree of divorce or dissolution* or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the *court of common pleas* [assigned to a geographical area] and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.
>
> "(b) Any woman who, having been cited to appear before a judge of the *court of common pleas* pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both."
>
> The bracketed material was added when the statute was amended in 1975. P.A. No. 75-406, § 6. The italicized material was substituted for "divorce decree" and "circuit court" respectively in 1974. P.A. No. 74-183, § 110. The merger of the circuit courts into the courts of common pleas is discussed at note 12 *infra*.

[3] We have also taken two further procedural steps. First, the original class determination is modified to include three sub-classes. The first sub-class consists of all persons against whom contempt actions under § 52-440b are currently pending. The second sub-class consists of all persons against whom action under the statute has been threatened, or will be threatened in the future, but against whom no actions are presently pending. The third sub-class consists of the children of all persons in the first and second sub-classes. Rule 23(c)(1), (4), Fed.R.Civ.P.

Second, the motions of Hattie Hoe, Linda Robustelli, and Louis Parley, Esq., as guardian *ad litem* for the children of the named plaintiffs, to intervene in this action are granted. Rule 24(b), Fed.R.Civ.P. Ms. Hoe, against whom an action was commenced on June 30, 1975, is allowed to intervene to assure a named plaintiff in the first sub-class with a live and continuing controversy. *See Hagans* v. *Wyman*, 527 F.2d 1151, 1153 (2d Cir. 1975). Ms. Robustelli and Mr. Parley are allowed to intervene as the named representatives of the second and third sub-classes, respectively. We

We have been instructed to reconsider two different aspects of federalism, abstention and pre-emption. We turn first to the issue of abstention.[4]

I. Abstention in Light of *Younger* v. *Harris*

[3, 4] The fact that the adult plaintiffs in this action, with the exception of the intervenor, Linda Robustelli, are defendants in pending contempt proceedings instituted by the Commissioner under the authority of § 52-440b (1976 Supp.), raises a serious issue of abstention in light of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971),[5] and its

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reaffirm our earlier finding as to the propriety of a class action and the ability of all the named plaintiffs, including the intervenors, to represent their respective sub-classes. Rule 23(b)(2), Fed.R.Civ.P.

[4] The concurrence relies on the distinction articulated by Justice Harlan in *Rosado* v. *Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), between ordering New York to conform its welfare program to federal statutory requirements and merely ordering that its federal funds be cut off unless it chooses to comply with those requirements, to avoid both the abstention and constitutional issues in this case. While we agree with Judge Newman's ripeness analysis as it affects plaintiff Linda Robustelli, against whom no contempt proceeding has commenced as yet, we disagree that it also obviates the necessity of ruling on the remaining plaintiff mothers' constitutional claims, or of confronting the *Younger* abstention problem.

Plaintiffs Roe and Doe have been ordered to disclose the names of their children's fathers. They have refused to do so. Contempt proceedings have been instituted against them in state court, and are pending at the present time. They have sought an injunction halting those proceedings from this court, claiming that their constitutionally protected privacy interests are being infringed.

Simply ordering the Commissioner to give up federal funding unless he complies with the Social Security Act would not halt the pending contempt cases. While we agree with Judge Newman regarding the Commissioner's likely decision, that prediction cannot properly be the basis for a conclusion that these constitutional claims are not ripe for adjudication. These plaintiffs have taken affirmative steps in violation of the Connecticut statute they challenge. Thus, they are in a very different position than were the plaintiffs (except George Poole) in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). And, unlike the plaintiffs in *Laird* v. *Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), they have a valid "claim of specific present objective harm [and] a threat of specific future harm." 408 U.S. at 14, 92 S.Ct. at 2326. There is no ripeness problem here. Accordingly, we must consider their constitutional claims, and the preliminary question of abstention to which the Supreme Court directed our attention.

[5] The following actions are currently pending in Connecticut courts. This court has been informed that the State has voluntarily stayed

progeny. The intervention of Ms. Robustelli, who has been threatened with prosecution, but against whom no action is presently pending, cannot circumvent the issue, for while she may be entitled to declaratory and injunctive relief on a personal basis, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), she cannot, under the guise of representing a class, dispense with the *Younger* considerations for those members of the class who are presently being prosecuted. "The requirements of *Younger* are not to be evaded by artificial niceties." *Allee* v. *Medrano*, 416 U.S. 802, 833, 94 S.Ct. 2191, 2209, 40 L.Ed.2d 566 (1974) (Burger, C. J., concurring in the result in part and dissenting in part). *Cf. Allee* v. *Medrano*, 416 U.S. at 816 n. 10, 94 S.Ct. 2191. However, in the opinion of this court *Younger* does not prohibit the issuance of an injunction or declaratory relief in this action. This conclusion is founded upon a determination that neither of the considerations which support the *Younger* doctrine apply in the circumstances of this case, and, in addition, a finding that the plainttiffs lack a state forum in which they can adequately present their constitutional arguments. The latter is an essential prerequisite to abstention under the *Younger* doctrine.

A. *The Pending State Proceedings are not Criminal.*

[5-7] The first consideration which underlies the *Younger* abstention doctrine is the traditional reluctance of federal courts to interfere with pending state criminal prosecutions. *Younger*, 401 U.S. at 43, 91 S.Ct. 746; *Douglas* v. *City of Jeannette*, 319 U.S.. 157, 63 S.Ct. 877, 87 L.Ed., 1324 (1943); *Fenner* v. *Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927

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the proceedings involving the named plaintiffs pending the outcome of this suit. No injunctions have been issued by this court. *White* v. *S. J.*, No. DN CV6-58218 (Ct. of Com.Pl., 6.A.6, New Haven Co.); *White* v. *V.P.*, No. DN CV6-58219 (Ct. of Com.Pl., 6.A.6, New Haven Co.); *Maher* v. *H.P.* (no Docket No.) (Ct. of Com.Pl., New Haven Co., June 30, 1975).

(1926). This consideration does not apply to the present case, however, because the pending state proceedings are in the nature of civil rather than criminal contempt.[6]

Under § 52-440b, it is the Commissioner of Social Services, not a district attorney, who has a woman who refuses to cooperate with the Department of Social Services cited to appear before a judge of the court of common pleas. This factor alone has been held to distinguish civil from criminal contempt in this circut. *In re Kahn,* 204 F. 581 (2d Cir. 1913). And *see In re Guzzardi,* 74 F.2d 671 (2d Cir. 1935).

The more general tests established by the Supreme Court to distinguish between civil and criminal contempt, *Shillitani* v. *United States,* 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); serve to strengthen the conclusion that contempt sentences administered under § 52-440b are primarily civil, for their purpose would be to coerce testimony, rather than to vindicate the dignity of the court. *Compare Shillitani, with United States* v. *Seale,* 461 F.2d 345 (7th Cir. 1972). In order to constitute criminal contempt, the statute would have to be interpreted to require proof of an intent to obstruct justice and an imminent threat to the administration of justice. *In re Williams,* 509 F.2d 949 (2d Cir. 1975).

Connecticut law recognizes and applies this distinction. As the Connecticut Supreme Court has recently stated:

> "In any event, in 1965 (prior to the commencement of the present proceedings), . . . the basic statute pursuant to which the previous proceedings were instituted was enacted as § 52-435a in chapter 911 entitled "Paternity

[6] Title 52 of the Conn.Gen.Stat.Ann. is entitled "Civil Actions." While this alone is not determinative, it is illustrative of the intent of the Connecticut legislature.

> Proceedings." No longer is there any reference in that section to quasi-criminal procedures such as arrest, pleas of guilty or not guilty, hearing on probable cause or binding over for trial. A plaintiff's paternity action has been stripped of any quasi-criminal characteristics and clearly converted to an unmistakable civil action."

Robertson v. *Apuzzo,* Conn. —— A.2d —— at ——, ——, 37 Conn.L.J. No. 38 (1976).

These contempt proceedings are therefore not "more akin to [a] criminal prosecution[s]" than to civil actions and they are not "in aid of and closely related to criminal statutes." *Cf Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 604, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975). And the nature of the proceeding is not converted to criminal simply because, under the statute in question, the State is suing in place of the parent. The stated purpose of § 52-440b is to allow the State to institute and successfully prosecute a paternity action and to recover support for the child. Rather than a criminal prosecution, the action is instead more in the nature of a civil debt collection.[7] The Welfare Commissioner is acting primarily as the guardian of the child, securing its rights, rather than as a criminal prosecutor or law enforcement officer "charged with

[7] In discussing contempt proceedings for the closely related purpose of enforcing support orders, once paternity has been established, the Connecticut Supreme Court stated:

> "It is obvious that the contempt proceedings authorized by § 52-442 are remedial in purpose, designed to operate in a prospective manner and to coerce, rather than to punish, the contemnor to comply with the order of the court. . . . The provisions for accomplishing execution of the court's money judgment and for contempt proceedings for failure to comply with the orders of the court do not convert the plaintiff's cause of action out of which the defendant's contempt of court arose from a civil to a criminal one."

Robertson v. *Apuzzo,* Conn., _____ A.2d _____ at _____, _____, 37 Conn.L.J. No. 38 (1976). Similarly, the fact that incarceration may be the sanction for non-compliance does not automatically make these proceedings criminal in nature. *Cf. Middendorf* v. *Henry,* _____ U.S., _____, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976).

the duty of prosecuting offenders against the laws of the state . . . [who] must decide when and how this is to be done."

Fenner v. *Boykin*, 271 U.S. at 243-244, 46 S.Ct. at 493, *quoted* in *Younger*, 401 U.S. at 45, 91 S.Ct. 746. *But cf. Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 556-61, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) (White, J., dissenting).

If these contempt proceedings can be said to be "in aid of and closely related to" any particular statute, it is the federal Social Security Act, and not any particular criminal law of the State of Connecticut. In these circumstances, the element of *Younger* which rests upon the traditional reluctance of courts of equity to interfere with a criminal prosecution simply does not "mandate restraint." *Cf. Huffman*, 420 U.S. at 604, 95 S.Ct. 1200.

B. *Federalism*

[8] The comity considerations inherent in our federal system provide the second rationale for the *Younger* policy of abstention. *See Younger*, 401 U.S. at 44, 91 S.Ct. 746. As *Huffman* made clear, these considerations apply no less to an action because it is civil in nature rather than criminal. There, the Court stated that:

> "Central to *Younger* was the recognition that ours is a system in which 'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.' [*Younger*, 401 U.S. at 44, 91 S.Ct. 746]."

Huffman, 420 U.S. at 601, 95 S.Ct. at 1207. *See Rizzo* v. *Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

However, given the nature of the plaintiffs' claims in this action, traditional notions of federal-state relations, rather than requiring abstention, impel this court to intervene, not only to protect the plaintiffs' constitutional rights, but also to enforce the congressional intent underlying the recent amendments to the Social Security Act.

Younger, and the cases which follow it, involved, in essence, an attempt by a defendant in a pending state court proceeding to remove the action to federal court, without congressional authorization, based solely upon the dual claims that his constitutional rights had been or were being violated, and the expressed or unexpressed belief that federal courts were somehow more sympathetic to constitutional rights. These arguments were conclusively rejected in *Huffman:*

> ". . . Art. VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do."

420 U.S. 611, 95 S.Ct. 1211.

[9] However, the challenges mounted by the plaintiffs in the present case are not exclusively substantive, constitutional ones. Consequently, the federalism issue must be viewed in a slightly different focus. Before this court can reach the plaintiffs' constitutional claims, it must first consider their claim that the state statute has been preempted by the recent amendments to the Social Security Act and the regulations to be promulgated thereunder. Although authority to invalidate a state law on preemption grounds is derived from the supremacy clause,[8] the test of the Connecticut statute's invalidity is

[8] *U.S.Const.* art. VI, clause 2.

whether it conflicts with federal legislation, not with a specific provision of the Constitution. The preemption doctrine, therefore, primarily involves the exercise of statutory interpretation, *i.e.*, the determination, in the absence of specific direction, of the congressional intent behind a specific statute or regulatory program. *Cf. Swift & Co.* v. *Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965).[9]

Federalism requires a different result in cases turning on the interpretation of federal statutes than it does in the cases presented in the *Younger* line of decisions. In addition to their special expertise in the interpretation of federal statutes, federal courts are more likely to give the proper emphasis to congressional intent and the necessary supremacy of federal law in the case of an actual conflict between federal and state legislation. Although all judges, state and federal, are sworn to uphold the federal laws and Constitution, state judges are not sworn to protect the legitimate interests of the national government at the expense of the legitimate interests of their own state sovereigns.

[10] This is not to say that pre-emption is common, or that it is a doctrine which should be aggressively applied by federal courts. Nor is it to say that state courts are not capable of giving proper weight to the national interests underlying federal legislation. It is simply a recognition that considerations of federalism necessarily recognize an area of expertise in each of the two overlapping court systems. As the Supreme Court

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[9] Justice Harlan, in his opinion in *Swift*, concluded that an action for an injunction against a state statute on the ground of pre-emption did not require convocation of a three-judge district court. He pointed out the distinction between the supremacy clause and the "substantive provisions" of the constitution, and reasoned that comity considerations were minimal in pre-emption cases. This position has recently been reaffirmed in *Moe* v. *Confederated Salish and Kootenai Tribes*, _____ U.S. _____, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

*See Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487.

stated in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16, 84 S.Ct. 461, 465, 11 L.Ed.2d 440 (1964):

> "Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.' *Louisiana P. & L. Co.* v. *Thibodaux*, 360 U.S. 25, 29 [79 S.Ct. 1070, 3 L.Ed.2d 1058]. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.* "[10]

[11] This distinction, between plaintiffs' claims based on substantive constitutional grounds and those based on pre-emption, is especially important for yet another reason. An additional factor in *Younger* cases is the hesitancy of lower federal courts to interfere in an ongoing judicial proceeding under any circumstances. A finding of pre-emption, however, is a finding that the intrusion has already occurred. If this court were to conclude that the recent amendments to the Social Security Act pre-empted any application of § 52-440b, it would be a finding that for reasons of national policy Congress had intended that the pending state court actions should not have been instituted. It would be a finding concerning the validity of the proceeding itself, not just concerning

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[10] The recognition of the special expertise of the lower federal courts has been reaffirmed as recently as *Steffel* v. *Thompson*, 415 U.S. 452, 464, 94 S.Ct. 1209, 1218, 39 L.Ed.2d 505 (1974). In that decision the Court cited F. Frankfurter & J. Landis, *The Business of the Supreme Court* 65 (1928), and emphasized that:

> "With this latter enactment [of the Judiciary Act of March 3, 1875], the lower federal courts 'ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" (Emphasis added in Supreme Court opinion.)

And *see Colorado River Water Conservation District* v. *United States*, _____ U.S. _____, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

the constitutionality of the particular statute or its particular application. While this would clearly be an intrusion into a legitimate sphere of the state interest, it would be an intrusion accomplished at the direction of Congress, and one which is clearly within Congress' power to direct.

For these reasons we conclude that notions of federalism, the second consideration underlying the *Younger* doctrine, likewise do not compel us to refuse to intervene in this action.

C. *Availability of a State Forum*

[12] Finally, there is an independent ground upon which abstention must be rejected. An essential prerequisite of abstention, *viz.* a forum in which the plaintiffs can present their constitutional claims, is not available under the special facts of this case.

In *Gibson* v. *Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1696, 36 L.Ed.2d 488 (1973), the Supreme Court stated:

> ". . . *Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."

And *see Huffman*, 420 U.S. at 594, 95 S.Ct. 1200.

Under the terms of § 52-440b, the Commissioner has the recalcitrant mother cited to appear before a judge of the court of common pleas. There she is ordered by the judge to testify and/or to institute a paternity action. If she refuses to do either she may be found in contempt of court. The statute contemplates a summary procedure, and does not appear on its face to allow the mother the right to challenge the authority

of the Commissioner to institute the proceedings, the central issue in this case. The summary contempt procedure apparently intended by the statute, and as disclosed in the transcripts included in the record, does not appear to allow the mother an opportunity to fully litigate any defenses, much less complex constitutional and statutory issues. *Cf. New Haven Tenants' Representative Council, Inc.* v. *Housing Authority of City of New Haven*, 390 F.Supp. 831 (D.Conn. 1975).

Furthermore, if we look beyond the theoretical concept of a court trial and consider the unique Connecticut philosophy, it appears that the court of common pleas might refuse to consider any constitutional challenge. In *State* v. *Muolo*, 119 Conn. 323, 326, 176 A. 401, 403 (1935), the Connecticut Supreme Court stated:

> "In the absence of constitutional or statutory prohibition, any court has power to pass on the constitutionality of a statute and it may be its duty to declare it invalid, but a proper regard for the great co-ordinate branch of our government, the legislative, and for the preservation of the respect of our citizens, who are apt to look askance upon a decision of a court so limited in its jurisdiction as the city court of New Haven holding invalid the considered legislative judgment, dictates that such a court should take such action only upon the clearest ground or where the rights of litigants make it imperative that it should do so. Otherwise it is better for such a court to leave the decision to our higher courts, to which the matter may be brought by appeal or otherwise."

While this may appear to leave room for a common pleas court to pass on constitutional issues and even to mandate that they do so in "imperative" cases, the doctrine has evolved to the point where the lower courts in Connecticut have refused

to hear constitutional defenses in criminal prosecutions,[11] not to mention welfare cases.[12]

Since there is no guarantee that the plaintiffs would be able to raise their constitutional and statutory defenses in the pending state proceedings, which is the fundamental point on which abstention rests *Younger* does not prevent the intervention of this court at this stage to protect the plaintiffs' rights to litigate those issues.

Having decided, for the several reasons set forth above, that our exercise of jurisdiction over this case does not jeopardize federal-state relations within the sphere of judicial authority, we turn next to the question of whether, at the legislative level, the laws enacted by the Congress conflict with the Connecticut statute challenged in this case under the supremacy clause.

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[11] *See* Children's Exhibit "B" on Remand. This exhibit consists of three memorandum decisions refusing to deal with constitutional issues in criminal cases. In each case the circuit court (now the court of common pleas) relied on *State* v. *Muolo*.

[12] *Helm* v. *Welfare Commissioner*, 32 Conn. Sup. 595, 600, 348 A.2d 317, 321 (Super.Ct.App.Sess.1975). On review of a circuit court decision, the three-judge panel held:

> "Initially the plaintiff assigned as error the court's failure to consider the plaintiff's constitutional claims. The court below did not err in holding that constitutional questions should be left to a court of higher jurisdiction. *State of Muolo*, 119 Conn. 323, 326 [176 A. 401.]"

It may be noted that in 1974, Connecticut reorganized its judicial system so as to consolidate its civil courts into a unified system of courts of common pleas. 1974, P.A. No. 74-183. This new system became effective on December 31, 1974.

Although the decisions cited above all arose in the old circuit courts, there is no reason to believe that the new courts of common pleas will be any more willing to entertain constitutional arguments. Under the new system, the court of common pleas is, like its predecessor, a court of limited jurisdiction. Conn.Gen.Stat.Ann. § 52-6 (1976 Supp.). Appeals from its decisions are taken to the Appellate Session of the superior court, the trial court of general jurisdiction. § 52-6a (1976 Supp.).

Helm v. *Welfare Commissioner*, *supra*, involved an appeal from a circuit court, but taken under the new appellate procedure. In the opinion, which upholds the continued validity of *State* v. *Muolo*, the court does not suggest that the demise of the circuit courts has in any way weakened the effect of the doctrine.

II. Pre-emption

[13] Preliminarily it should be noted that although this issue was considered in this court's earlier opinion,[13] the issue of pre-emption now comes before us in a somewhat different posture because of new federal laws enacted since that time. We must, therefore, consider this issue "in light of [the law] as it now stands, not as it once did." *Hall* v. *Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201, 24 L.Ed.2d 214 (1969).

In its mandate to this court, the Supreme Court noted:

> ". . . [S]ince that time Pub.L. 93-647, 88 Stat. 2337, was enacted. Pub.L. 93-647 amends § 402(a) of the Social Security Act to require parents, as a condition of eligibility for AFDC assistance, to cooperate with state efforts to locate and obtain support from absent parents but provides no punitive sanctions comparable to that provided by Conn.Gen.Stat. Rev. § 52-440b (1973)."

Section 402(a), 42 U.S.C.A. § 602(a) (1976 Supp.), has been amended once again since the Supreme Court's ruling by Pub.L. No. 94-88 § 208(a) (Aug. 9, 1975) so that, with this most recent amendment shown in brackets, it now reads:

> "§ 402(a):
>
> "A state plan for aid and services to needy families with children must. . . .
>
> "(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required —
>
> ". . .
>
> "(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect

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[13] 365 F.Supp. at 70-73.

to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child [unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed]; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section);

"(27) provide, that the State has in effect a plan approved under part D and operate a child support program in conformity with such plan."

Whatever one may think of the wisdom of these new amendments, which now condition eligibility for welfare assistance on cooperation in locating and obtaining support from absent parents and which require the State to set up a separate program to accomplish this result, it is readily apparent that Congress had strong views in favor of the enforcement of the parental obligations of fathers of children of unwed mothers.[14]

[14] In looking to the circumstances existing at the time the amendment was made, *see Moor* v. *County of Alameda*, 411 U.S. 693, 709, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), it may be noted that the intensive consideration given to the problem of securing parental support for the children of unwed mothers was not by any means accidental. Congress was aware of the fact that the number of AFDC recipients whose fathers were absent from the home had increased from 2.4 million persons in 1961 to 8.7 million by the end of June 1974. *See* legislative history of Pub.L. No. 93-647, 1974 U.S.Code Cong. & Admin.News, 93d Cong., 2d Sess., Vol. 4, at 8145-56.

Many strands have been woven together (including incentives for both the family and the State) in the establishment of this new legislation designed to enforce the obligations of the absent parent. Indeed, the new provisions added to Title IV of the Social Security Act by Pub.L. No. 93-647 are so comprehensive that Congress established a new "Part D — *Child Support And Establishment Of Paternity*" to embrace them. Pub.L. No. 93-647 § 101 (Jan. 4, 1974), U.S.Code Cong. & Admin. News, 93d Cong., 2d Sess., Vol. 2, at 2716, 2732-43.[15] Detailed explication of all of them is not necessary for purposes of considering the pre-emption claim of the plaintiffs. In essence, the new amendments make an unwed mother who refuses to cooperate ineligible for benefits, a result which this court earlier held to be an illegal deprivation of benefits to her. *Cf Doe* v. *Norton*, 365 F.Supp. at 71-72 and n. 8. To protect against an arbitrary denial of benefits, the new legislation specifically requires that the mother may not be found ineligible if she "is found to have good cause for refusing to cooperate," under standards that "shall take into consideration the best interests of the child on whose behalf aid is claimed." We turn now to consider whether the Connecticut legislation conflicts with the federal statute as so amended to such a degree that the state statute must be struck down.

[15] Since Social Security was first enacted nearly 40 years ago, Congress has constantly revised it. In addition to the amendment of § 402(a) by Pub.L. No. 93-647 (Jan. 4, 1974), to provide that an unwed mother's eligibility should be conditioned on a certain amount of cooperation with State efforts to locate and obtain support from absent parents, of relevance also is new § 454, 42 U.S.C.A. § 654 (1976 Supp.), which in essence requires that a State plan must provide a single separate organizational unit (as the Secretary may by regulation prescribe) to undertake to establish paternity of a child born out of wedlock. § 454(4)(B). It also requires that the plan provide that "the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services. . . ." § 454(6)(A).

New § 457, 42 U.S.C.A. § 657 (1976 Supp.), deals with "Distribution of Proceeds;" it provides:

"(a) . . .

"(1) 40 per centum of the first $50 of [monthly support payments collected] shall be paid to the family without any

The argument for pre-emption is that the application of the state's statute will obstruct the effectuation of the federal policy expressed in the above statutory provisions to such a degree that the state interests must yield. Viewing the new Part D from that perspective, it cannot be denied that Congress has adopted a very expansive program for establishing paternity and collecting support, one calling for the exercise of power on so many fronts that very little area is left open for state action.

[14-16] But the existence of this broad area of mutuality of purpose of state and federal authority is insufficient to completely preclude state action. *DeCanas* v. *Bica*, —— U.S. ——, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). Thus, the argument that § 52-440b is invalid because Congress has not chosen to require contempt proceedings against an uncooperative mother cannot be sustained. Congressional purpose to displace local laws must be clearly manifested. *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 85, 59 S.Ct. 438, 83 L.Ed. 500 (1939). Where the federal statute has not expressly proscribed certain action but has merely been silent there is no basis for an inference that Congress intended to forbid state supplementary action.

> ". . . [T]he intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation

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decrease in the amount paid as assistance to such family during such month."

Sections 454(4)(A) and (B), 42 U.S.C.A. § 654(4)(A), (B) (1976 Supp.), which were to be parts of the State plan for child support, were further amended by Section 208(b) and (c) of Pub.L. No. 94-88 (Aug. 9, 1975), which qualified the state's duty to establish paternity and compel support. These actions are to be undertaken

> ". . . unless the agency administering the plan of the State determines in accordance with the standards prescribed by the Secretary pursuant to 602(a)(26)(B) of this title that it is against the best interests of the child to do so."

> and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state. This principle has had abundant illustration." (Citations omitted.)

Savage v. *Jones*, 225 U.S. 501, 533, 32 S.Ct. 715, 726, 56 L.Ed. 1182 (1912). Nor does the identity of state and congressional purpose furnish a sufficient basis for a finding of congressional intent that the state should refrain from taking steps beyond those which Congress requires of it to achieve their mutual purpose. When a similar argument was presented in *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973), the Court responded:

> "We do not agree. We reject, to begin with, the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. . . ." [16]

And *see DeCanas* v. *Bica*, —— U.S. ——, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).

In *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941), Justice Black observed that in considering whether state laws were pre-empted by federal laws dealing with the same subject, the Court

> "has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment;

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[16] The Court explained:

> "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem."

413 U.S. at 415, 93 S.Ct. at 2514.

and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. . . ."

While none of these is an inappropriate description of pre-emption formulae in earlier cases, the difficulties which formerly attended a determination of pre-emption have been reduced.[17] There has been a shift from the multifarious theories that formerly underlay pre-emption to a much narrower field for judicial analysis.

[17] While ". . . prior cases on pre-emption are not precise guidelines," *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638, 93 S.Ct. 1854, 1862, 36 L.Ed.2d 547 (1973), the situation here is comparable to that in *Dublino* where the Court held that state work incentive programs in the administration of the AFDC program, which were complementary to those of HEW, were not pre-empted. In that case the crux of the test for pre-emption in the context of AFDC legislation is clearly set forth:

> "In considering the question of possible conflict between the state and federal work programs, the court below will take into account our prior decisions. Congress 'has given the States broad discretion,' as to the AFDC program, *Jefferson* v. *Hackney*, 406 U.S. 535, 545 [92 S.Ct. 1724, 32 L.Ed.2d 285] (1972); see also *Dandridge* v. *Williams*, 397 U.S. at 478 [90 S.Ct. 1153, 25 L.Ed.2d 491]; *King* v. *Smith*, 392 U.S. 309, 318-319 [88 S.Ct. 2128, 20 L.Ed.2d 1118] (1968), and '[s]o long as the State's

[17] For criticisms of the several pre-emptive standards in earlier cases, see Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 Stan.L.Rev. 208 (1959); Selected Essays 1938-62, 310 (1963); and of the recent change in the Court's approach to pre-emption, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum.L.Rev. 623 (1975).

> actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *Jefferson*, *supra*, at 541 [at 1729 of 92 S.Ct.] Conflicts, to merit judicial rather than co-operative federal-state resolution, should be of substance and not merely trivial or insubstantial. But if there is a conflict of substance as to eligibility provisions, the federal law of course must control. *King* v. *Smith*, *supra*; *Townsend* v. *Swank*, 404 U.S. 282 [92 S.Ct. 502, 30 L.Ed.2d 448] (1971); *Carleson* v. *Remillard*, 406 U.S. 598 [92 S.Ct. 1932, 32 L.Ed.2d 352] (1972)."

413 U.S. at 423 n. 29, 93 S.Ct. at 2518.[18]

The new amendments outlined above require that the eligibility of an unwed mother be determined solely under standards to be established by HEW, pursuant to the provisions of the Social Security Act. Close attention was paid by Congress to the interests of the children in requiring their unwed mothers to cooperate in establishing the parental obligations of their fathers. It is not until *after* a member of the plaintiff mothers' class is found not to have "good cause for refusing to cooperate," under "standards that take into consideration the best interests of the child on whose behalf aid is claimed," that the defendant Commissioner may resort to the ancillary remedy available under the state statute. Leaving this determination to state administration of an AFDC program is in accord with tradition; HEW has never had direct contact with applicants for assistance. In view of the establishment of such safeguards of the child's best interests, the state law, which comes into play only after the defendant Commissioner

[18] In determining whether a substantial conflict exists between state and federal statutes, the court must construe both as narrowly as the language and legislative history permit. Only after first attempting to reconcile the statutes may the court find a conflict and thus avoid ruling on a substantive constitutional claim. *Cf. National Ass'n of Regulatory Util. Comm'rs* v. *Coleman*, 399 F. Supp. 1275, 1278 (M.D.Pa.1975).

has complied with the provisions of the Social Security Act, can hardly be regarded as frustrating any part of the purpose of the federal legislation. On the contrary, it strengthens it.

Where the federal policy favoring disclosure of the name of the father is as strongly manifested as here, it stands logic on its head to argue that Connecticut's statute is in conflict with that policy.[19] Indeed, the whole of the new Part D would be nothing but an exercise in futility if the putative father should never be identified. The ancillary remedial process afforded by § 52-440b, which is specifically designed to obtain the name of the father, builds upon a legal obligation established by the state; it supplements, but does not alter or supplant, the federal law. Rather than being inconsistent with Part D it may often be the *sine qua non* for any use at all of Part D. There is no reason why the State of Connecticut "might not properly beget a more serious penalty, if the [Connecticut] legislature deemed it wise." *California* v. *Zook*, 336 U.S. 725, 736, 69 S.Ct. 841, 846, 93 L.Ed. 1005 (1949). Even with the use of § 52-440b there is no guarantee of a successful outcome.

[19] It is clear that prior to the enactment of Pub.L. No. 94-88, HEW saw no conflict between the requirement in § 52-440b that the mother begin a paternity action, and the federal statute as amended by Pub.L. No. 93-647.

45 C.F.R. § 232.11 (1975), which deals with the duty of the applicant to assign any rights of support, states:

> "(c) If there is a failure to execute an assignment pursuant to this section, the State may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations."

Pub.L. No. 94-88 (August 9, 1975) deals with the duty to cooperate in obtaining support, a somewhat more onerous burden than simply assigning rights to support, but a duty which is also enforced in Connecticut under § 52 440b. Since we interpret this amendment to require the Commissioner to make the determination concerning the best interests of the child before he institutes contempt proceedings, the amendment itself adds nothing to the pre-emption argument. If the Commissioner finds that instituting contempt proceedings against the mother is not contrary to the best interests of the child, the Congressional concern is satisfied. Furthermore, the child's interests are fully protected, since the initiation of contempt proceedings must, under the regulations, also mean that the mother has been found ineligible for assistance. 45 C.F.R. § 232.12 (1975). This in turn means that the mother has a right to a fair hearing at which the Commissioner's determination can be reviewed. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). *Cf. Mathews* v. *Eldridge*, ____ U.S. ____, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[18] Applying the foregoing principles, our conclusion is that no sufficient ground appears for denying validity to the Connecticut statute under the doctrine of pre-emption, once the Commissioner has made the required determination regarding the best interests of the child. The statute does not cover the same ground as the new Part D of the Social Security Act and is not in conflict with it. Because we hold that the state statute is not incompatible, and is therefore not pre-empted by the federal statute, we must now consider the constitutional questions which the plaintiffs have presented.

III. The Constitutional Issues

The plaintiffs renew the argument that to subject an unwed mother to the sanctions of the statute must be so contrary to the best interests of her child that § 52-440b cannot be constitutionally applied under any circumstances.

We have previously dealt with the claims of both the mothers and their children that the state statute challenged in this action violates their substantive constitutional rights. In denying those claims, each of the theories advanced by the plaintiffs were discussed at length and no useful purpose would be served by repetition here. We adhere to the conclusions reached in our former opinion.

IV. Modification of Prior Opinion

[19, 20] The supremacy of federal law does come into play in this case in one respect. Although § 52-440b can stand unimpaired, the defendant's right to resort to its use must now be conditioned upon his prior compliance with conditions which did not previously exist. The new amendments to the Social Security Act require that the defendant Com-

missioner may not find an unwed mother who refuses to cooperate in establishing the paternity of her child born out of wedlock ineligible for benefits until he first determines that she does not have good cause for refusing to cooperate, under standards which take into account the best interests of the child.[20] Compliance with these requirements does not jeopardize any legitimate interest in federalism. The defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs. This is so even though the proceedings were commenced before the new law was enacted. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 282, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). Until the defendant Commissioner has made the required determinations, continuation by him of the contempt proceedings against the plaintiffs, or removing them from the welfare rolls for their failure to "cooperate," is at the very least inappropriate. *Cf. Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972).

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[20] It has been brought to our attention that because Pub.L. No. 94-88, § 208 (Aug. 9, 1975), requires that proposed regulations implementing the "best interests of the child" policy be presented to Congress for specific approval, HEW has taken the position that the entire amendment will not become effective until the new regulations have been approved. We do not believe that this is the proper construction of the act.

Congress has not merely put the states on notice that it intends to begin worrying about the children's interests at some time in the future. Rather, it has expressed a strong desire that the cooperation requirements of Pub.L. No. 93-647 not be enforced in a manner contrary to the best interests of the very children whom the AFDC program is intended to assist. Congress' interest is so keen that it has further decided to exercise close supervision over the implementing regulations.

Given this status, and comparing the interests of the various states in enforcing the cooperation requirements with the potential damage to the children-beneficieries of the program if overly harsh enforcement measures are employed against their parents, the wiser course is to require the Commissioner, if he is unable to determine without the aid of specific regulations that his proposed enforcement action is not against the best interests of the child, to postpone any enforcement until the new regulations have been issued and approved.

We therefore order that the defendant shall not remove the plaintiff mothers from the status of eligibility or begin or continue with any pending contempt proceedings against them under § 52-440b until after full compliance with the provisions of Section 402(a)(26) of the Social Security Act as amended. In all other respects, however, the relief requested by the plaintiff is denied.

SO ORDERED.

NEWMAN, District Judge (concurring in the result):

Since the Court concludes that the Commissioner's failure to make a determination as to whether disclosure of the father's identity is in the best interests of the child is inconsistent with the requirements of the Social Security Act, 42 U.S.C. § 402(a)(26)(B), the Supremacy Clause requires that the Commissioner either forego seeking compulsory disclosure or forego receipt of federal funds. See *Rosado* v. *Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). It is unlikely that the Commissioner will elect to forego federal funds. In any event, he should be given an opportunity to decide whether to bring the state program into conformity with federal statutory requirements before this Court rules on whether compelled disclosure, without the statutorily required determination, encounters constitutional objections. Because I agree with the conclusion that the statutory requirement has not been met, I concur in the result, without consideration of the constitutional issues. See, generally, Soifer, *Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary*, 7 Conn.L.Rev. 1 (1974).

My view of the limited statutory issue before us also affects the abstention issue. If we were required to decide the constitutionality of the state contempt proceedings, we would encounter the issue of *Younger* abstention, to which the Supreme Court's remand directed our attention. But since

the statutory issue suffices for decision of the case at this point, our relief need not enjoin any state proceedings. Technically, according to *Rosado*, our relief should be a declaration and injunction barring the Commissioner from receiving federal funds until his disclosure policy is in compliance with federal statutory requirements. Such an order does not by its terms enjoin any state proceedings, and therefore should not encounter *Younger* objections. If the Commissioner chooses to withdraw his contempt applications in order to assure receipt of federal funds, *Younger* does not stand in the way of a federal court ruling that precipitates such state administrative action.

Since, thus analyzed, the abstention issue does not preclude relief, there is no reason to place any reliance on the supposed lack of capacity of the Connecticut Court of Common Pleas to adjudicate constitutional issues. See *State* v. *Muolo*, 119 Conn. 323, 176 A. 401 (1935). That decision was announced more than forty years ago in the context of the former town courts, in which judges were not required to be attorneys, and from which most appeals were taken *de novo*. Conn. Gen. Stat. §§ 51-134, 54-12 (1958). Even as to a court of such limited authority, the *Muolo* decision did not preclude it from constitutional adjudication, but simply indicated that it should take such action "only upon the clearest ground or where the rights of the litigants make it imperative that it should do so." 119 Conn. at 326, 176 A. at 403.

It is true that in some instances the Connecticut Circuit Court, which replaced the town courts, viewed *Muolo* as authority for declining to rule on constitutional issues, see decisions collected in Children's Exhibit B on Remand, and in at least one instance the appellate session of the Superior Court approved this practice. *Helm* v. *Welfare Commissioner*, 32 Conn. Sup. 595, 600, 348 A.2d 317, 37 Conn. L.J. No. 24, at 12, 14 (1975). Whether that approach of total abdication of

responsibility or even the restrictive approach of *Muolo* has continuing validity in the context of the modern Connecticut Court of Common Pleas is a highly questionable proposition. In the first place, *Muolo* itself suggested that unless constitutional adjudication were imperative, it would be better for the former town courts "to leave the decision to our higher courts, to which the matter may be brought by appeal or otherwise." 119 Conn. at 326, 176 A. at 403. Yet the Court of Common Pleas itself was one of the higher courts to which appeals from the town courts were taken. Plainly *Muolo* does not intimate any restriction on the capacity or responsibility of the Court of Common Pleas to adjudicate constitutional issues. And there is no reason to assume that the responsibility of that court has been diminished simply because the jurisdiction of the former Circuit Court has been merged with its own.

Furthermore, serious constitutional issues are posed by the suggestion that a state judge, even of a court of limited jurisdiction, can decline to adjudicate a federal constitutional or statutory question when it arises in a case properly within his jurisdiction. *Cf. Testa* v. *Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912). He has taken an oath to uphold the United States Constitution, and his oath,[1] and the Supremacy Clause,[2] may well obligate him to decide federal constitutional and statutory questions properly before him. It has been held that even a state constitutional provision limiting the authority of lower state courts to decide constitutional questions cannot displace the Supremacy

---

[1] Conn.Const., Art. XI, § 1 (1965); Conn.Gen. Stat. § 1-25. The oath is itself required by the United States Constitution: ". . . all . . . judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . ." U.S.Const., Art. VI.

[2] "This Constitution, and the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . ." U.S.Const., Art. VI.

Clause requirements imposed upon all state judges. *People* v. *Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146 (1921).

In this litigation, I have previously expressed the view that rather sensitive constitutional adjudication will be required of State Common Pleas judges in the course of considering contempt actions to compel disclosure of the father's identity. 365 F.Supp. at 84. How that adjudication will be affected by the administrative determination now required is also a question that need not be anticipated at this point. But I place no reliance whatever on any limitation of the responsibility of a State Common Pleas judge. It will be time enough to consider that issue when a litigant can demonstrate, in a case properly within our jurisdiction, that she has been injured by the failure of a Common Pleas judge to decide an issue arising under the Constitution or laws of the United States. Until such a case arises, I prefer to think that judges of the Common Pleas Court will seriously accept and discharge the responsibilities imposed upon them by the Supremacy Clause. *See New Haven Tenants' Representative Council, Inc.* v. *Housing Authority of City of New Haven*, 390 F.Supp. 831 (D.Conn. 1975).

APPENDIX B

Judgment of the three-judge District Court below.

FILED

Jun 17 3:03 P.M. '76
U.S. DISTRICT COURT NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. 15,579

DONNA DOE, ET AL, Individually and on behalf of all others similarly situated

v.

EDWARD MAHER, Individually and as Commissioner of Social Services of the State of Connecticut

CIVIL NO. 15,589

SHARON ROE, ET AL, Individually and on behalf of all others similarly situated

v.

EDWARD MAHER, Individually and as Commissioner of Social Services of the State of Connecticut

JUDGMENT

This case having come on for further proceedings before the Three-Judge District Court upon remand by the Supreme Court of the United States,

And the Court having filed its Memorandum of Decision, under date of June 1, 1976,

It is ORDERED, ADJUDGED and DECREED that the defendant shall not remove the plaintiff mothers from the status of eligibility or begin or continue with any pending contempt proceedings against them under § 52-440b until after full compliance with the provisions of Section 402(a)(26) of the Social Security Act as amended. In all other respects, however, the relief requested by the plaintiffs be and is hereby denied.

Dated at New Haven, Connecticut, this 17th day of June, 1976.

SYLVESTER A. MARKOWSKI,
Clerk, U.S. District Court

By: Frances J. Coneglio
Deputy in Charge

APPROVED:

WILLIAM H. TIMBERS, U.S. Circuit Judge

M. JOSEPH BLUMENFELD, U.S. District Judge

JON O. NEWMAN, U.S. District Judge

APPENDIX C

Notice of Appeal.

FILED

Jul 29 11:07 A.M. '76
U.S. DISTRICT COURT NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Nos. 15,579 & 15,589

July 29, 1976

DONNA DOE, ET AL, Individually
and on behalf of all others
similarly situated

SHARON ROE, ET AL, Individually
and on behalf of all others
similarly situated

v.

EDWARD MAHER, Individually and
as Commissioner of Social Services
of the State of Connecticut

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Edward W. Maher, Commissioner of Social Services of the State of Connecticut, the defendant above named, hereby appeals to the Supreme Court of the United States from the final judgment ordering the permanent injunction enjoining the defendant from further

enforcing Index (Section) 404.6, effective November 1, 1975, of the Connecticut Department of Social Services Policy Manual entered in this action on the 17th day of June, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

MICHAEL ANTHONY ARCARI
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114
Tel. 203 - 566-7040
Attorney for Defendant

FILED

Jul 29 11:07 A.M. '76
U.S. DISTRICT COURT NEW HAVEN, CONN.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Civil Nos. 15,579 & 15,589
DONNA DOE, ET AL, Individually
and on behalf of all others
similarly situated

SHARON ROE, ET AL, Individually
and on behalf of all others
similarly situated

v.

EDWARD MAHER, Individually and
as Commissioner of Social Services
of the State of Connecticut

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 1976, the defendant's notice of appeal to the United States Supreme Court in the above entitled suit was duly served by depositing the same in a United States Post Office, with first class postage prepaid, addressed to David Rosen, Esquire, 265 Church Street, New Haven, Connecticut, Frank Cochran, Esquire, Connecticut Civil Liberty Union Foundation, 57 Pratt Street, Hartford, Connecticut, Stephen Wizner, Esquire, Yale Legal Services, 127 Wall Street, New Haven, Connecticut, Douglas Crockett, Esquire, Tolland-Windham Legal Assistance Assoc.,

746 Main Street, Willimantic, Connecticut, Elliott Taubman, Esquire, New London Legal Assistance, 3-11 North Main Street, Norwich, Connecticut, and Robert Beckman, Esquire, Norwalk-Stamford and Danbury Regional Legal Services, 342 Atlantic Street, Stamford, Connecticut. I further certify that all parties required to be served have been served.

MICHAEL ANTHONY ARCARI
Assistant Attorney General
Counsel for the Defendant

90 Brainard Road
Hartford, Connecticut 06114
Tel. 203 - 566-7040

APPENDIX D

Section 404.6, effective November 1, 1975, Volume I, Chapter III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Program Manual.

Connecticut Department of Social Services
Social Service Policies — Public Assistance

Manual Vol. 1 Chapter III Supplement IV-D

CHILD SUPPORT PROGRAM

Absent Parent's Support — AFDC 404.6 - 404.7

404.6 *Responsibility for Support and Establishment of Paternity*

Information about the alleged father is obtained from the mother of the child. If he resides in the State, an interview is held to discuss the situation and to secure his Acknowledgement of Paternity.

The mother is required to name the father, by Affirmation of Paternity, under oath and to file a petition to establish paternity and support.

If the mother is unable to name the father, she is still eligible for assistance to meet her own needs, the needs of the child in question, and the needs of any other children in the family, provided all other eligibility requirements are met; however, she is informed that she is subject to be cited to appear before any judge of the Court of Common Pleas, be compelled to name the putative father and and to institute an action to establish paternity of the child.

If the mother is unwilling to name the father, she is not eligible for assistance to meet her own needs; however, her children remain eligible for assistance. In this case also the mother is informed that she will be cited to appear before any judge of the Court of Common Pleas and be compelled to name the putative father. An action to establish paternity of the child will be instituted by the Child Support Unit.

404.7 *Legal Determination of Paternity*

Paternity proceedings are initiated in the Court of Common Pleas in the case of each out-of-wedlock child for whom the Department has been unsuccessful in securing a written acknowledgement of paternity and the mother has named the father. Statements made by the mother substantiate a likelihood of establishing paternity when the putative father is residing in the State.

APPENDIX E

Section 52-440b of the General Statutes of Connecticut.

SEC. 52-440b. *Compelling disclosure of name of putative father. Institution of action.* (a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a decree of divorce or dissolution or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the court of common pleas and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.

(b) Any woman who, having been cited to appear before a judge of the court of common pleas pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both.

APPENDIX F

Departmental Letters.

UNITED STATES GOVERNMENT

MEMORANDUM

TO: Elmer W. Smith
Acting Regional Director, OCSE

FROM: Acting Director
Office of Child Support Enforcement

SUBJECT: Section 208 of P.L. 94-88

RECEIVED
Apr. 6, 1976
PROGRAM OPERATIONS

DATE: Nov. 21, 1975

This is in reply to your memorandum of October 10 in which you raised two questions concerning approval of the IV-D plan. Your questions, and our responses thereto, are as follows:

1. Under the authority of P.L. 94-88, Section 208, New Jersey has included a statement that it will not be necessary to establish paternity if it will result in family discord, or deprivation to legitimate children or be harmful to a new family. In the absence of standards prescribed by the Secretary (which are called for by the statute), New Jersey insists that we would be unjustified in refusing to approve its plan containing this language. Yet the New Jersey plan

language appears to be much broader than the statute contemplates and probably much broader than the Department's regulations (when promulgated) would find acceptable. What is your recommendation for dealing with this issue?

Section 208 of P.L. 94-88 is not a self-implementing statute. We have been advised by the Office of the General Counsel that when a statute contains no clear substantive provisions, but rather requires the Department or Secretary to issue standards or regulations, States should not amend their plans until such time as the Department promulgates such standards or recommendations. Therefore, State IV-D plans should not be approved if they contain "ad hoc" State-devised provisions relating to section 208 of P.L. 94-88.

Regulations are currently being developed which will implement both the IV-A and IV-D provisions of section 208. In the interim, States have at their disposal the provisions of 45 CFR 303.5 (b), which specify that the IV-D agency need not attempt to establish paternity in cases involving incest, forcible rape, or adoption, if it would not be in the best interests of the child. In addition, we would hope that the IV-D agency would, regardless of the provisions of P.L. 94-88, utilize care and common sense in administering its program so that children and their custodial parents or caretaker relatives will not be harmed by the support enforcement process.

2. The IV-D preprint contains a provision for making information available to public officials. However, section 402 (a) (9) of the Act

relating to safeguarding of information was amended by P.L. 94-88 to repeal the public official provision. How should this be handled?

Section 402 (a) (9) does not apply to safeguarding of information in the IV-D program. However, since the IV-A and IV-D programs are so closely related and serve so much of the same population, it was determined to be desirable to extend the same safeguards to the IV-D program that are applicable to the IV-A program, by virtue of authority granted by sections 452 (a) (1) and 454 (13) of the Act.

The problem which you raise has now been resolved by the promulgation of 45 CFR 302.18, effective August 1, 1975. The amendment to the IV-D preprint was issued by OCSE-AT-75-9. An advance copy is attached for your information. The Department's regulations now conform with the provisions of 402 (a) (9) as amended by P.L. 94-88.

JOHN A. SVAHN

Attachment

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
GOVERNMENT CENTER
BOSTON, MASSACHUSETTS 02203

Office Of Child Support Enforcement

July 30, 1976

In reply refer to: OCSE

RECEIVED
Aug. 12, 1976
PROGRAM OPERATIONS

Mr. Vincent Capuano
Chief of Eligibility Services
Connecticut Department of Social Services
110 Bartholomew Avenue
Hartford, Connecticut 06105

Dear Mr. Capuano:

Re: *Doe et al.* v. *Maher*

In response to your July 12, 1976 letter requesting a legal opinion; on *Doe et al.* v. *Maher,* our regional attorney has consulted with the Office of General Counsel in Washington and has forwarded to us the following statement:

"We are informed that this decision of the District Court is consistent with the position taken by HEW pending the issuance of regulations to implement Public Law 94-88, and that Footnote 20 of the Court's opinion somewhat

misconstrues the HEW position. It is true that Section 208 of Public Law 94-88 is not a self-implementing statute, but rather requires the Secretary to issue standards or regulations for a State's determination that a mother has good cause for refusing to cooperate in establishing paternity (which standards shall take into account the best interests of the child on whose behalf aid is claimed). Until these regulations are issued by HEW, States may not amend their State plans to implement the statute; and State IV-D plans will not be approved by HEW if they contain "ad hoc" State-devised provisions relating to Section 208 of Public Law 94-88. However, in the interim, States have at their disposal the previously-issued HEW regulations at 45 C.F.R. 303.5(b), which specify that the IV-D agency need not attempt to establish paternity "in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity." In addition, HEW has indicated that IV-D agencies, on a case by case basis, should utilize care and common sense in administering the program so that children and their custodial parents or caretaker relatives will not be harmed as a result of their cooperating with the State in establishing paternity or obtaining support. This position of HEW, encouraging individualized determinations of whether a mother has good cause (with consideration of her child's best interests) for not cooperating in establishing paternity, would seem to accord with the holding of the Federal District Court that the defendant Commissioner should make a determination that his enforcement action against plaintiffs is not against the best interests of their children. We also are informed that

HEW will not penalize States for a good faith effort to ascertain on a case by case basis whether cooperation in establishing paternity would not be in the child's best interests."

Sincerely,

CHARLES C. GENTILE
NEIL P. FALLON
Acting Regional Director

APPENDIX G

Section 404.6, Volume I, Chapter III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Manual (presently in effect).

Connecticut Department of Social Services
Social Service Policies — Public Assistance
Manual Vol. I Chapter III Supplement IV-D

CHILD SUPPORT PROGRAM

Absent Parent's Support — AFDC 404.6 - 404.7

404.6 *Responsibility for Support and Establishment of Paternity:*

Information about the alleged father is obtained from the mother of the child. If he resides in the State, an interview is held to discuss the situation and to secure his Acknowledgement of Paternity.

If the mother is able and willing to name the father, she is to do so by Affirmation of Paternity, under oath and to file a petition to establish paternity and support. If the mother is unable to name the father, she is still eligible for assistance to meet her own needs, the needs of the child in question, and the needs of any other children in the family, provided all other eligibility requirements are met; however, she is informed that she is subject to be cited to appear before any judge of the Court of Common Pleas, be compelled to name the putative father and to institute an action to establish paternity of the child.

If the mother is unwilling to name the father, she and her children remain eligible for assistance, pursuant to the provisions of the ruling in DONNA DOE, et al, v. EDWARD MAHER which states that the Commissioner of Social Services may not find an unwed mother who refuses to cooperate in establishing the paternity of her child born out-of-wedlock ineligible for benefits until he first determines that she does not have good cause for refusing to cooperate, under standards which take into account the best interests of the child. Such standards, to be established by H.E.W. regulations, are in the process of promulgation by the H.E.W. Secretary. Pending the establishment of the aforesaid standards, a tickler will be issued by the support worker to review the case when policy is issued.